

**December 18, 2003**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

*Application for Exception*

Name of Petitioner: Occidental Power Marketing, L.P.

Dates of Filing: July 7, 2003

Case Number: TEE-0009

This Decision concerns the merits of an Application for Exception filed by Occidental Power Marketing, L.P. (OPM) with the Office of Hearings and Appeals (OHA) of the U.S. Department of Energy (DOE) under the provisions of 10 C.F.R. § 1003.20. The Application concerns the annual revenue and sales data that the DOE Energy Information Administration (EIA) collects through Form EIA-861, "Annual Electric Power Industry Report." Occidental provides this data and EIA publishes the material, by state, in firm-specific annualized form. The present exception request seeks to have the OPM data withheld from publication. According to OPM, if the material is released it will enable competitors of a related firm to which it resells electricity, the Occidental Chemical Corporation (OxyChem), to know the cost of OxyChem's production of chlor-alkalai and thus place OxyChem at a competitive disadvantage.

**Background**

The EIA reporting requirements arise from domestic dislocations of crude oil and petroleum products that occurred during the 1970s. Specifically, in 1979 Congress found that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to an energy crisis. Congress therefore authorized the DOE to collect data on petroleum product supply and price. Form EIA-861 collects annual information regarding the retail sales and associated revenue from the retail sales of electricity of individual firms identified as energy service providers. As an energy provider, OPM is required to submit Form EIA-861. Normally, due to the public interest in the material filed with EIA, with few exceptions, the material is released to the public. In the case of the Form EIA-861, release of the material by EIA occurs approximately one year following the period for which the data are furnished.

An Application for Exception may be granted where the reporting requirement causes a “special hardship, inequity, or unfair distribution of burdens.” 42 U.S.C. § 7194(a); 10 C.F.R. § 1003.25(b)(2). Because all reporting firms are burdened to some extent by the reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from the impact of the requirement on other reporting firms.

The standard for relief in this case is complicated by the fact that even if the requested exception is granted, the information might still be subject to mandatory release to the public under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. No interest would be served if the material were kept from publication through approval of an exception only to be disclosed under the FOIA. Therefore, in addition to addressing why it meets the standards for an exception, we asked OPM to address the question of whether the data would be withholdable from a requester under the FOIA.<sup>1</sup>

Material may be withheld from disclosure under the FOIA if there is evidence of the existence of competition and a likelihood of competitive harm.<sup>2</sup> The basis for the exception requested by OPM is that publication of the information will cause injury, i.e., competitive harm. To that extent, the criteria for an exception and for withholding under the FOIA are much the same.<sup>3</sup> Where the standards differ, exception relief requires a showing of uniqueness or disproportionate impact.

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<sup>1</sup> A formal determination of releasability of the data under the FOIA is not possible without having an actual request for information under the FOIA.

<sup>2</sup>Exemption 4 exempts from mandatory public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information that is (1) “commercial” or “financial,” (2) “obtained from a person,” and (3) “privileged or confidential.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). In *National Parks*, the United States Court of Appeals for the District of Columbia Circuit found that commercial or financial information is “confidential” for purposes of Exemption 4 if disclosure of the information is likely either (i) to impair the government’s ability to obtain necessary information in the future or (ii) to cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. This confidentiality test was specifically limited to information submitted to the federal government under non-voluntary conditions in *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (*Critical Mass*). By contrast, information that is provided to an agency *voluntarily* is considered “confidential” if “it is of a kind that the provider would not customarily make available to the public.” *Critical Mass*, 975 F.2d at 879. Because Form EIA-861 is a mandatory filing under the Federal Energy Administration Act of 1974 (P.L. 93-275), we find that the withheld information was “involuntarily” submitted to EIA. *BP Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,796 (1999); *see William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Thus, as we have held previously, for this information to be properly withheld under Exemption 4, the *National Parks* test must be met.

<sup>3</sup> The applicant points out that under the FOIA standard one need only show the likelihood of injury, rather than actual injury. In practice, this does not differ substantially from the exception standard.

## Application for Exception

OPM is a certified “Retail Electric Provider” (“REP”) under the regulations of the Public Utility Commission of Texas. As such, the firm makes no sales outside the state of Texas and, other than a small amount sold to DuPont de Nemours & Co. for backup purposes, all of OPM’s sales are to affiliated firms.<sup>4</sup> According to OPM all these affiliates are major consumers of electric energy engaged in either chemical manufacturing or the enhanced recovery of oil and gas. OPM states that disclosure of its average cost of purchased power contained in the Form EIA-861 would reveal sensitive commercial and financial information regarding the affiliates’ manufacturing and production operations and give their competitors an advantage. OPM’s main concern is for the operations of its OxyChem affiliate.

OxyChem purchases electricity from OPM for the manufacture of chlor-alkalai at two OxyChem facilities in Texas. According to the submission, OxyChem’s major chlor-alkalai competitors in Texas are Formosa Plastics and Dow Chemical. Also according to OPM, both Dow and Formosa self-generate electricity for manufacturing chlor-alkalai. Neither competitor, however, is required to file form EIA-861, which would reveal the cost of electricity used in its manufacturing processes, while publishing the OPM data will reveal the cost of electricity provided by OPM to OxyChem.<sup>5</sup>

The applicant has provided a brief description of the chlor-alkalai manufacturing process and the uses for the product:

OxyChem operates chlor-alkalai manufacturing facilities in Texas, located on the Houston Ship Channel and at Ingleside near Corpus Christi. Chlor Alkalai plants produce chlorine and a byproduct, caustic soda, through a process that involves applying electricity to salt brine, using diaphragm, membrane, or mercury cell technology. Chlorine is used in a variety of industrial applications, including the production of polyvinyl chloride . . . pharmaceuticals, crop protection chemicals, and other organic compounds, as well as in drinking water purification and wastewater disinfection. The largest users of caustic soda are the pulp and paper, detergent and chemical industries.

*Occidental Power Marketing submission, July 7, 2003*

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<sup>4</sup> Occidental Chemical Corporation, Occidental Permian, Ltd., Occidental Tower Corporation, OXY USA WTP, L.P. Oxy Vinyls, L.P., and Ingleside Cogeneration, L.P. *Occidental Power Marketing submission, July 7, 2003*

<sup>5</sup> OPM has provided an official listing of Retail Electric Providers in the State of Texas which *does not* include Formosa Plastics or Dow chemical. *Appendix, Occidental Power Marketing submission, August 8, 2003*

Also according to the applicant:

The major variable cost for a chlor-alkalai plant is attributable to electricity utilized in the electrolysis process. Salt water and other raw materials used in the process are relatively inexpensive, thus the key to a plant's profitability is the cost of the electricity that it utilizes. The chlor-alkalai industry is highly competitive and margins are very low. Because of the importance of electricity to the manufacturing process, producers of caustic chlorine treat information related to the cost of electricity as highly proprietary. Competitors who have access to a chlor-alkalai producer's cost of electricity can make judgments as to the producer's overall costs of production and can use this information in pricing their own production.

*Occidental Power Marketing submission, August 8, 2003*

OPM states that the chlor-alkalai manufacturing process is well established, the cost of the components other than electricity (steam, salt, chemicals) is easily known by competitors, and electricity represents the manufacturer's greatest production cost, perhaps 80% of the cost of production. As a result, OPM argues that any competitor would only need to know OxyChem's cost of electricity to know with accuracy the cost of the chlor-alkalai it produces.

Finally, the Texas Public Utility Commission (PUC) no longer makes publicly available pricing data from REPs such as OPM. According to OPM, "as of January 1, 2002, sales of electricity in Texas (in areas subject to customer choice) are no longer made by traditional electric utilities, but are now made by non-utility competitive REPs. Information as to sales and revenues by REPs is considered confidential and is treated as such by the Texas PUC." *Id.* Accordingly, OPM argues that among its competitors it is the only chlor-alkalai manufacturer in Texas whose principal cost of manufacturing will be made public – and that the resulting competitive harm warrants an exception.

## **Analysis**

We have reviewed the OPM submissions and concluded that an exception is warranted. Information as to the manufacture of chlor-alkalai is generally available and confirms OPM's claims regarding the components, the well-known nature of the process for manufacturing the substance, and its uses (*See*; <http://www.vul.com.vulchemicalsproducts>) The uses for the product – e.g., water purification – and the large number of manufacturers tend to confirm the competitiveness of the industry. Copies of the OPM submissions were made available to the EIA and no comments were made concerning the claim that, among the chlor-alkalai competitors in Texas, OxyChem is the only manufacturer whose electricity costs would be divulged as a result of publication of EIA-861 data.

Several comments were made concerning the OPM submission:

- Because the majority of the electricity used by OxyChem is self-generated, data concerning the smaller amount of power obtained from OPM would not necessarily reveal OxyChem's pricing posture.
- OPM supplies electricity to more customers than just OxyChem so that OPM's average annual price to all customers would not provide a reliable estimate of its average price to OxyChem.
- Because an outsider would not know OxyChem's cost of self-generated electricity, the average annual prices charged to all customers by OPM is even more unimportant.

OPM responds that the Federal Energy Regulatory Commission receives and publishes all the information concerning the OxyChem self-generation facilities that – along with the price of natural gas over time – is necessary to determine OxyChem's cost of self-generated electricity. Thus the cost of the remainder of OxyChem's electricity needs, which are filled through purchases from OPM, remain the only confidential cost component of the OxyChem process. Moreover, the competitive nature of the chlor-alkalai market is such that “competition occurs at the margin, i.e., for incremental production . . . (and thus) . . . it is information concerning *incremental* cost, not average cost that will be of most value to a competitor.” *Occidental Power Marketing submission, October 14, 2003*

In *Public Service Electric and Gas Company (New Jersey), (Case No. VEE-0044) February 24, 1998*, we considered the claim that release by EIA of electrical generator heat-rate data of each electrical generator in each plant would cause competitive injury. According to the applicant, the heat-rate information along with ambient outdoor temperatures and the cost of fuel would allow the applicant's competitors to know its marginal cost of generating a KWH of electricity. The considerations in that case are the same in principle as those presented here.

Unlike the OPM case, however, the situation pointed up by the Public Service Electric and Gas request had widespread implications, and a rulemaking by the EIA ultimately produced the result sought by the utility in its exception request. Nonetheless, absent the rulemaking, the facts of the Public Service application would have warranted favorable consideration of its exception request, and those same factors apply to the OPM request. We agree with OPM that the marginal cost to OxyChem of electric power is sensitive, proprietary information that is typically withheld by competitors in the chlor-alkalai manufacturing industry, and that the release of the OPM data would cause OxyChem competitive harm. Given the disproportionate impact of the filing requirement on OPM and its OxyChem affiliate, under the circumstances of this case, exception relief is warranted.

We have also considered the whether the OPM data – if requested under the FOIA – would be released or withheld. *See Notes 1 and 2.* It is clear that the data is “information that is (1) ‘commercial’ or ‘financial,’ (2) ‘obtained from a person,’ and (3) ‘privileged or confidential.’” *National Parks at 770.* The pricing data is obviously “financial” information and, as a corporate entity, OPM is a “person.” In addition, submission of the data by OPM to EIA is mandatory; because of the likelihood of competitive harm, the material is “confidential.” *Ibid.* Therefore, it appears at this point that the data would be withheld from a requester under Exception 4 of the FOIA.

## **Exception Relief**

In considering whether exception relief was warranted for OPM, we consulted the EIA first, regarding their views on the validity of the underlying request, and then as to how relief might be implemented. To the extent appropriate, the EIA comments and concerns were communicated to OPM and its responses solicited. This process produced agreement as to the circumstances warranting exception relief and the form relief should take.

EIA’s main concern with respect to its treatment of data in filings is the public interest. Under legislation it is obliged to collect and release to the public the greatest amount of data possible concerning the nation’s power supplies. The EIA publishes aggregate annual data for all form EIA-861 reporting entities in each state, as well as aggregate annual data for each reporting entity in a state. As a result, simply deleting data for OPM would not protect the material because adding all the data released for individual entities in Texas and comparing that figure with the total data reported for Texas would reveal the withheld OPM data. Therefore, EIA initially thought that to protect the OPM data, information reported by at least one other entity would also have to be withheld. EIA kept in mind the public interest in having access to the maximum amount of information possible.

Ultimately EIA concluded that the public interest in having statistical information relating to the amounts of power generated in a state outweighed the public interest in knowing the name of every one of the individual firms that generated power and filed form EIA-861. To protect the OPM data, EIA concluded that it must withhold the identity of OPM and two other reporting entities from the detailed data for Texas.<sup>6</sup> This creative solution protects the OPM information while allowing all supply information for the State of Texas to be made available to the public. This is the form that exception relief in this case will take.

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<sup>6</sup> If the identity of only one firm other than OPM were deleted, the second firm would know its own data thus revealing the OPM data.

**It Is Therefore Ordered That:**

1. The Application for Exception Filed by Occidental Power Marketing, L.P. on July 7, 2003, Case No. TEE-0009 is hereby granted as set forth below.
2. In publishing the detailed annual data for EIA-861 respondents in the State of Texas, the Energy Information Administration will delete identifiers for Occidental Power Marketing and two other EIA-861 filers.
3. This is a final order of the Department of Energy. Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act (42 U.S.C. 7194) may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: December 18, 2003